VIEWPOINT

The Problem with Unpublished Opinions

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Last year, the U.S. Court of Appeals for the Fifth Circuit wrote 3,369 opinions but published only 543 of them—that is, just over 13 percent.[1] Pursuant to a long-standing Fifth Circuit rule, the 2,826 unpublished opinions are not considered precedent and, in most cases, cannot be found in the Federal Reporter System or online.[2]

The Fifth Circuit is not alone. All thirteen U.S. Courts of Appeals have similar rules, which commentators have called "alarming because [the rules] abridge free speech and authorize courts to ignore their past acts."[3] Last year, almost 80 percent of the written opinions in the federal circuits were unpublished.[4] Recently, the Eighth Circuit held its rule to be unconstitutional but on rehearing withdrew its opinion.[5] Another court, the Ninth Circuit, considered sanctions against an appellate lawyer for citing an unpublished opinion.[6] The Fifth Circuit sparked a debate en banc over the proper role of unpublished opinions when one panel decided a case differently from a previous panel—even though the facts were identical and the case involved the same defendant. The first panel decision was unpublished and therefore not binding precedent in the subsequent case.[7]

The defendant in that case asked the Fifth Circuit to hear the case en banc but the court refused over the dissents of Judges Jerry Smith, Edith Jones, and Harold R. DeMoss. The dissenting opinion criticized the court for refusing "to examine the question of unpublished opinions generally, an issue that is important to the fair administration of justice in this circuit."[8] The dissenters called the practice of denying precedential status to unpublished opinions "questionable."[9]

The dissents came in *Williams v. Dallas Area Rapid Transit*, a case in which Dallas Rapid Transit (DART) sought immunity from suit under the Eleventh Amendment. DART had just won such a ruling from the Fifth Circuit in a prior case, *Anderson v. DART*.[10]

As Judge Smith explained in his dissent: "Based, however, on the mere fortuity that the *Anderson* panel decided not to publish, our panel in *Williams* was free to disagree with *Anderson* and to deny DART the same immunity that *Anderson* had conferred on it less than two years earlier."[11] Judge Smith asked the rhetorical question: "What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do?"[12]

The problem created by unpublished opinions is not confined to the Fifth Circuit. In *Anastasoff v. United States*,[13] Judge Richard Arnold, writing for the court, declared unconstitutional the Eighth Circuit rule that states that "unpublished opinions are not precedent, and parties generally should not cite them."[14] The issue arose because a prior Eighth Circuit panel had decided precisely the legal question raised by the parties. The prior decision was adverse to Anastasoff, who made no effort to distinguish the case but rather argued that the decision had no precedential effect because it was unpublished.

The *Anastasoff* panel felt itself bound by the prior panel decision even though the opinion was unpublished and held that the rule denying precedential effect was unconstitutional. Judge Arnold reasoned that issuance of decisions with nonprecedential effect exceeded the power delegated to the judiciary under Article III of the Constitution.[15] The case then went en banc and the panel decision was vacated in light of a subsequent settlement.[16] As a result, the rule remains in place but "the constitutionality of that portion of Rule 28A(i), which says that unpublished opinions have no precedential effect remains an open question in this circuit."[17]

Judge Arnold's opinion drew mixed reviews. Judge Alex Kozinski of the Ninth Circuit immediately labeled Judge Arnold's constitutional analysis "hogwash."[18] He added that the decision was "total nonsense, and I expect it to have a very short life."[19] Judge Kozinski fulfilled his own prophecy, at least in his jurisdiction, when he authored a lengthy opinion upholding the Ninth Circuit's version of the rule.[20]

In *Hart v. Massanari*,[21] the appellants' opening brief cited an unpublished opinion. The court issued a show cause order seeking to determine whether counsel should be sanctioned for violating the Ninth Circuit rule that forbids referring to unpublished decisions. Citing *Anastasoff*, the attorney responded that the rule might be unconstitutional. Judge Kozinski, writing for the panel, noted that "*Anastasoff*, while vacated, continues to have persuasive force. It may seduce members of our bar into violating our Rule 36–3 under the mistaken impression that it is unconstitutional. We write to lay these speculations to rest."[22]

Judge Kozinski's meticulous opinion answers Judge Arnold's analysis in *Anastasoff* and concludes that

> [u]nlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. . . . The common law has long recognized that certain types of cases do not deserve to be authorities, and that one important aspect of the judicial function is separating the cases that should be precedent from those that should not. Without clearer guidance than that offered in *Anastasoff*, we see no constitutional basis for abdicating this important aspect of our judicial responsibility.[23]

Even though the court rejected the Eighth Circuit's analysis, it did not impose sanctions against the attorney, finding that the violation of the rule was

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not willful and advanced a nonfrivolous constitutional issue.

The competing views of Judges Arnold and Kozinski are reflected in the legal literature.[24] But the practice of designating a substantial number of opinions as unpublished is coming under increasing attack. Before 1964, there were relatively few unpublished opinions but today more than 75 percent of all final decisions by the appeals courts go unpublished.[25]

Opponents of the rule say this leads to

- Loss of precedent
- Sloppy decisions
- Lack of uniformity
- Difficulty of higher court review
- Unfairness to litigants
- Less judicial accountability
- Less predictability[26]
- Constitutional concerns

The *Vanderbilt Law Review* published a recent empirical study that attempted to determine empirically what factors influence the decision to publish an opinion.[27] The authors of the study noted that since 1975, when rules were first adopted permitting unpublished opinions, the U.S. appellate courts "have maintained two bodies of law. One is published, widely disseminated, and fully precedential. The other, now encompassing nearly 80 percent of all dispositions on the merits, is unpublished, erratically distributed, and rarely precedential."[28]

The authors concluded that, after reviewing their data, there was reason to be both reassured and concerned about the manner in which decisions were designated for publication.[29] But they warned that

> at least some unpublished decisions reach results with which other judges would disagree, and that judges and courts also vary in their tendency to publish outcomes. It follows that denying precedential value to unpublished opinions gives judges discretion to decide which of their rulings will bind future decision-makers—and sets the stage for inconsistent treatment of like cases.[30]

There are also First Amendment issues raised by the no-citation rules. Some circuits, like the Ninth, forbid litigants from citing prior unpublished opinions. This is arguably a content-based restriction on speech justified only by judicial efficiency and not by a compelling state interest.[31] There is also the question of access, which implicates the Petition Clause of the First Amendment. If citizens cannot learn what a branch of government is doing, how can they effectively petition the government for redress of grievances?[32]

In light of these concerns, the Texas Supreme Court has given tentative approval to an amendment to its rule regarding unpublished opinions. The amendment will abolish unpublished opinions, require short "Memorandum Opinions" in specified cases, and allow citation of all judicial opinions, even if they were previously designated as unpublished. Prior to the effective date of the amendment, any decision that was unpublished will not be binding precedent but may be cited as authority.

This proposal generated unanimous editorial support from the state's major news media.[33] It became a campaign issue in the recent election for three open positions on the Texas Supreme Court. All but one of the candidates supported abolition of unpublished opinions. The candidate who favored continuation of the "do not publish" rule was defeated.

Although Judge Kozinski and those who favor unpublished opinions focus on the practicalities of their workload and the debate over precedent, attention must be given to other significant issues noted above.

Endnotes

1. CLERK'S ANNUAL REPORT ON JUDICIAL WORKLOAD STATISTICS FOR THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT (2001), *available at* http://www.ca5.uscourts.gov/clerk/docs/arstats.pdf (last visited Apr.10, 2002).

2. 5TH CIR. R. 47.5.4 reads as follows:

> Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document.

Id.

3. Note, Drew R. Quitschau, *Anastasoff v. United States:* Uncertainty in the Eighth Circuit—Is There a Constitutional Right to Cite Unpublished Opinions 54 ARK. L. REV. 847 (2002).

4. Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Court of Appeals?*, 54 VAND. L. REV. 71 (2001).

5. *See* Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *vacated on rehearing*, 235 F.3d 1055 (8th Cir. 2000).

6. Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

7. *See* Williams v. Dallas Area Rapid Transit, 242 F.3d 315 (5th Cir.), *cert. denied*, 122 S. Ct. 618 (2001).

8. Williams v. Dallas Area Rapid Transit, No. 00–10361, 2001 WL 716949, at *1 (5th Cir.) (dissenting from denial of rehearing en banc).

9. *Id.*

10. 180 F.3d 265 (5th Cir.) (per curiam) (unpublished) (table), *cert. denied*, 528 U.S. 1062 (1999).

11. *Williams*, 2001 WL 716949, at *1.

12. *Id.*

13. 223 F.3d 898 (8th Cir. 2000), *vacated on rehearing*, 235 F.3d 1055 (8th Cir. 2000).

14. *Id.* at 899 (quoting 8TH CIR. R. 28A(i)).

15. *Id.* at 900–01 (8th Cir. 2000).

16. 235 F.3d 1055 (8th Cir. 2000).

17. *Id.* at 1056.

18. *See* Quitschau, *supra* note 3, at 853 n.39.

19. *Id.*

20. 9TH CIR. R. 36–3; Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001).

21. *Hart*, 266 F.3d at 1155.

22. *Id.* at 1159.

23. *Id.* at 1180.

24. *See, e.g.*, Merritt & Brudney, *supra* note 4, at 71; B. Martin, *Judges on Judging: In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177 (1999).

25.Quitschau, *supra* note 3, at 860.

26. Martin, *supra* note 24, at 179.

27. Merritt & Brudney, *supra* note 4, at 71.

28. *Id.* at 72.

29. *Id.* at 121.

30. *Id.* at 120–21.

31. *See* Quitschau, *supra* note 3, at 875.

32. *See* C. Babcock, *Texas Supreme Court Considers Abolishing Unpublished Opinions*, 39 HOUSTON LAW. 22, 27 n.7 (2001).

33. C. Babcock, *Published Opinions Help Texas Courts*, BEAUMONT ENTER., Jan. 15, 2002; C. Babcock, *Appellate Court Opinions Should Be for the Record*, CORPUS CHRISTI CALLER-TIMES, Jan. 30, 2002; B. Davidson, *Court Opinions Should Become Public*, SAN ANTONIO-EXPRESS NEWS, Dec. 16, 2001; *Court Blackout—Too Many Opinions Are Kept Under Wraps*, DALLAS MORNING NEWS, Dec. 13, 2001; *Unpublished Appellate Court Opinions Corrode Texas Law*, HOUSTON CHRON., Dec. 9, 2001; *Court Opinions Need More Review*, HOUSTON CHRON., Dec. 9, 2001; Untitled, STAR-TELEGRAM (Metro/Fort Worth & Region), Dec. 17, 2001.